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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1998

CAROLINE HAGGARD FLORES,
also known as Caroline Haggard,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE APPELLANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW HER PLEA OF GUILTY BECAUSE SHE HAD BEEN LED TO BELIEVE THAT HER AGREEMENT FOR A 36 MONTH DETERMINATE SENTENCE COULD STILL RESULT IN A SENTENCE LESS THAN 36 MONTHS.

2. WHETHER FLORES PROPERLY AND KNOWINGLY WAIVED HER RIGHT TO COUNSEL AT THE HEARING ON THE MOTION TO WITHDRAW HER PLEA OF GUILTY AND WHERE SHE WAS ORDERED TO PROCEED *PRO SE*.

LIST OF PARTIES TO THE PROCEEDING

Caroline Haggard Flores is represented on appeal by Jimmy Parks and Edward Camara, Jr., and was represented at trial by Alan Brown. The United States is represented on appeal by Assistant United States Attorney Joseph Gay. Attorneys for the United States at trial were Ray Jahn and LeRoy Morgan Jahn in cause no. SA-96-CR-108, and Bill Harris in cause no. SA-97-CR-112. In this Cause No. 98-50579, *Caroline Haggard Flores v. United States of America*, on appeal from the United States Court of Appeals for the Fifth Circuit, the undersigned counsels on appeal certify that the following persons also have an interest in this case:

1. Caroline Haggard Flores who is incarcerated,
2. Flores's immediate family in San Antonio, Texas.

The undersigned counsels of record certify that they are aware of no persons other than those listed who have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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OPINION BELOW

The opinion of the Court of Appeals below has not been designated for publication. It is reproduced in the Appendix at 1.

BASIS OF JURISDICTION

This Court has jurisdiction to review on a writ of certiorari the judgment in question because the United States District Court has so far departed from the accepted and usual course of judicial proceedings, and the United States Court of Appeals for the Fifth Circuit has sanctioned such departure, so as to call for an exercise of this Court's supervisory power. The basis for jurisdiction in the U. S. Court of Appeals for the Fifth Circuit is Rules 3 and 4(b), Federal Rules of Appellate Procedure. Jurisdiction in the U. S. District Court was established by indictment for felony violations of 18 U.S.C. 2 and 18 U.S.C. 1001, Aiding and Abetting by giving false statements; 18 U.S.C. 2 and 18 U.S.C. 1341, Aiding and Abetting Mail Fraud; 18 U.S.C. 371, Conspiracy to defraud the United States; and 18 U.S.C. 1957, Money Laundering. Flores was convicted on May 12, 1998, and judgment of conviction and sentence were entered on June 3, 1998. Notice of Appeal was filed on June 11, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(The pertinent text for each citation below is set out in the Appendix beginning at 29.)

U.S. CONST. AMEND. SIX

FED. RULES OF CRIM. PROC. 11(e)(1)(C)

FED. RULES OF CRIM. PROC. 11(e)(3)

U.S. SENTENCING COMMISSION GUIDELINES MANUAL, sec. 5K1.1 (NOV. 1997)

18 U.S.C. 2

18 U.S.C. 371

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18 U.S.C. 1341

18 U.S.C. 1957

STATEMENT OF THE CASE

Caroline Haggard Flores was indicted in Cause No. SA-96-CR-108 in the Western District of Texas, San Antonio Division for the offense of Conspiracy to Defraud the United States Government by Filing False and Fraudulent Medicare Claims, and was also indicted in SA-97-CR-112 for the offense for Conspiracy to Evade the Collection of Income Tax.

Flores entered into a plea agreement on

November 5, 1997. Flores entered her plea of guilty to both charges on November 6, 1997, the next day. Flores was sentenced on May 12, 1998 to 36 months in prison on each of the cases, to run concurrent; a $50,000 fine was assessed in Cause No. SA-96-CR-108; and three years concurrent supervised released was assessed in each case, along with 1500 hours of community service. (Sentencing pp. 49-50).

Flores entered into a plea agreement for a specific sentence under Federal Rule of Procedure 11(e)(1)(C). The plea agreement called for 36 months which was below the minimum guideline level and was to take into account Flores's testimony for the government.

Flores had read the agreement (Plea, p. 4) and reviewed it with counsel (Plea, p. 5). During the plea the Court entered into a colloquy with Flores, in which the Court informed her that the sentencing guidelines would delineate the range within which the Court would set the sentence. The Court told the Flores that if a circumstance existed that was not taken into account by the guidelines, the Court could "impose a sentence lower than or greater than the punishment called for by the guidelines." (Plea, p. 11) The prosecutor, Mr.

Harris, intervened and instructed the Court that the sentence was already specified by agreement:

> "The Court: That binds the Court, does it not?
>
> Mr. Harris: It does, your honor, and, thus, modifies the allocution that you have already engaged in with Mrs. Flores. Thereby making the Court's allocution inapplicable as to the sentencing guideline range.
>
> The Court: Okay. Since it is an 11(e)(1) provision, - - do you understand what that means, Mrs. Flores?
>
> Defendant Haggard Flores: Yes, sir - - yes, your honor.
>
> The Court: That means the Court is somewhat bound, even though it doesn't like to be in this case, or any other case, but I am going to look at the plea agreement very carefully, and if I accept it that's what we will do."

(Plea, at 12).

The conversation continued at page 13 at which the Court stated:

> "The Court: Do you understand that there will be no probation in

this case?

> Mr. Brown: Your honor, she understands that if you follow the plea bargain she will not get probation. There is also another provision where- -
>
> The Court: The 5 K?
>
> Mr. Brown: Yeah, 5 K 1. She doesn't think she's going to get probation, that is not what we are pleading for. But I mean just that those are possible because they have happened.
>
> The Court: Sure. With the understanding that it is a rarity to get probation in federal Court and certainly a rarity to get one in this Court, but I am going to look at everything."

(Plea, at 14).

The Court accepted the plea and deferred sentencing pending preparation of a presentence report. (Plea, at 24).

At the sentencing hearing the Court once again indicated to Flores that she could be sentenced to less than the 36 months:

> "In the plea agreement you would be sentenced to 36 months, or less, which is substantially less time."

(Sentencing Hearing, at 8, lines 11 and 12).

The Court read back the colloquy concerning the possibility, although a rare one, that Flores could receive probation. (Sentencing Hearing, at 19).

The Court admitted that Flores's testimony had been effective when she testified in the tax case for the government, but that she was not to be given credit for testifying. (Sentencing, at 28). The prosecutor, Ray Jahn, informed the Court that the consideration for the cooperation was the reduction of the sentence to the 36 months. In other words the 36 months was a determinate sentence that could not be lowered. Flores informed the Court that she had discovered a few weeks earlier, in discussions with her attorney, that there never was an opportunity for her to earn or receive a sentence less than the 36 months. (Sentencing Hearing, at 29, lines 1-14).

Flores urged her previously filed Motion to Withdraw Plea of Guilty and alternatively, orally moved for a continuance in order to procure other counsel, because her attorney of record refused to go forward on the Motion to Withdraw Guilty Plea.

The Court denied Flores's motion for a continuance. (Sentencing, at 1). Flores's attorney replied that his client objected to going forward with the sentencing on other grounds and he wanted to be able to put those other grounds in the record, but instead he asked the client to present her other grounds.

The Motion to Withdraw was filed 3 or 4 days before sentencing. Her attorney informed the Court that Flores had told him that she was innocent and that the plea was involuntary. However, the attorney said that he would like for her to present the motion to withdraw and suggested that she needed other counsel, because he had a conflict (Sentencing, p. 3, 4, lines 16-22). The Court did not inquire into whether the conflict was real.

Flores asked for additional time to procure other counsel. (Sentencing, at 6). Attorney Brown admitted that the Motion to Withdraw had been presented to him by Flores with an affidavit attached. However, he did not file the affidavit because of the perceived conflict. (Sentencing, at 7).

The government characterized her withdrawal as "buyer's remorse", but when Flores tried to explain that there were many other circumstances

as to why she wanted to withdraw her plea, the Court interrupted:

> "Defendant Haggard Flores: Excuse me, your honor, there are many other circumstances - -
>
> The Court: No. No, I'm not finished.
>
> Defendant Haggard Flores: I'm sorry."

(Sentencing at 7).

Attorney Brown indicated that if she wanted the motion heard by an effective attorney who could assist her, Flores needed a continuance in order to have other counsel present the motion. (Sentencing, p. 9).

The judge then told Flores that she was there by herself (Sentencing at 11, lines 5-7). The Court swore her in and proceeded with, what could be construed to be, a Motion to Withdraw Plea hearing, after the Court had allowed Mr. Brown to leave Flores without counsel. The Court, the prosecutors, and Flores *pro se*, proceeded to have a hearing. Flores never waived her right to counsel, and conversely, informed the Court that she did not want the Court to

remove Mr. Brown. (Sentencing, at 5).

During the sentencing Flores stated that she had not had adequate time to review the presentence report with her attorney. (Sentencing, at 39 and 41).

At the sentencing the Court told Flores that "probation is not authorized". (Sentencing, at 42, line 25). Attorney Brown then argued for a lower sentence than the 36 months, evidencing that he believed the determinate sentence could be disregarded by the Court. (Sentencing, at 44, 45 and 46). The misleading nature of the proceedings was exacerbated by the fact that the prosecutor, Mr. Jahn, stated the plea agreement was a precalculated downward departure with a determinate sentence. (Sentencing, p. 43). But attorney Brown argued:

> "...well, I think she should get substantially less, and then she's not getting a very good deal for what she's done for the government, for saving them the trial, for pleading guilty, and for testifying. I feel that she thought that, you know, from the cooperation and the different things that she would get more, less than the 36 months."

(Sentencing, at 56, lines 14-20).

Her claim was that she did not have sufficient time to prepare for sentencing, nor did she understand the plea agreement. (Sentencing, at 27 and 29). The Court recognized that she felt she had been misled (Sentencing, at 35), but denied the motion to withdraw (Sentencing, at 39, lines 12-13), and allowed Mr. Brown to re-enter the case for the sentencing.

REASONS FOR GRANTING THE WRIT

I. FLORES SHOULD HAVE BEEN ALLOWED TO WITHDRAW HER PLEA BECAUSE SHE HAD BEEN LED TO BELIEVE THAT HER AGREEMENT FOR A 36 MONTH DETERMINATE SENTENCE COULD STILL RESULT IN A SENTENCE LESS THAN 36 MONTHS.

The standard of review is abuse of discretion. A defendant is entitled to fairness under the Due Process Clause of the Constitution, not only in plea negotiations, but in the securing of the deal. *Weatherford v.*

Bursey, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). Any claim that induces a plea must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 261-62, 92 S.Ct. 495, 489-99, 30 L.Ed.2d 427 (1971); *Maybry v. Johnson*, 467 US 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

A plea agreement, although evaluated under the scrutiny of contract law, involves the expectation of fundamental fairness. *U.S. v. Smith*, 648 F.Supp. 495, 498 (S.D. Tex. 1986) *See also, Stokes v. Armontrout*, 851 F.2d 1085 (8th Cir. 1988), *reh. denied* September 9, 1988. The bargaining must be conducted fairly and without the threat of a heavier sentence for those who refuse to plead. *U.S. v. Mack*, 655 F.2d 843 (8th Cir. 1981); *U.S. v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978).

A plea must be freely and voluntarily made free from any misleading inducement or it is void. Inadvertently misleading a defendant about the number of years she can receive voids the sentence. *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

> "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a

> conviction. Out of just consideration for a person accused of crime, Courts are careful that a plea of guilty shall not be accepted unless made ... with full understanding of the consequences."

Kercheval v. U. S., 274 U.S. 220, 223 47 S.Ct. 582, 583 71 L.Ed. 1009 (1927).

If the issue of improper inducement or threat is raised, a hearing is necessary to determine the details behind the allegation. *Machibroda v. U.S.*, 368 U.S. 487, 82 S.Ct. 510(1962). The record objectively shows that Flores was misled through inadvertence and mistake. She was first told that her sentence would be determined by the guidelines and advised as to the circumstances that would allow the Court to depart from the same. Attorney Brown talked of probation, conceding that the plea was not being made expecting probation, but that probation was a possibility.

At sentencing the Court continued to tell Flores that she could be sentenced to 36 months *or less*. Attorney Brown continued to argue for less. In *Haynes v. U.S.*, 348 F.Supp. 1032 (E.D. Mo. 1972), the defendant entered into a plea because his attorney led him to believe that a deal had been made to get him a lesser sentence

if he pled guilty. A hearing was required to discover what was promised. Flores believes that the record adequately reflects that she had been mistakenly led to believe that through her efforts she could receive a sentence of less than 36 months.

Flores was going to receive a 36 month sentence, regardless. Rule 11(e)(1)(C) states, "the attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may ... agree that a specific sentence is the appropriate disposition of the case."

Rule 11(e)(3) states, "if the court accepts the plea agreement the court shall inform the defendant. It will embody in the judgment and sentence the disposition provided for in the plea agreement." That language has been held to prohibit a District Court from sentencing a defendant to anything less severe than the agreed sentence.

Although the advisory committee notes would give the appearance that the Court could lessen a sentence, the actual text of 11(e)(3) does not allow for any lesser sentence. There was a version of 11(e)(3) proposed by the Supreme Court in 1974 that contained language allowing

for a more favorable sentence. However, the House Judiciary Committee deleted that language. *See, 121 Cong. Rec. 23322 (July 17, 1975).* *See, U.S. v. Chatman*, 869 F 2d 525(9th Cir. 1989), *U.S. v. Stevens*, 548 F.2d 1360 (9th Cir. 1977), *cert. denied*, 97 S.Ct. 1666; holding that when an agreement was reached for a 10 year sentence, and the Court imposed less, the sentence was "illegal".

The rule was designed to permit the government to agree on a specific sentence, nothing more, nothing less. *U.S. v. Burruezo*, 704 F.2d 33 (2nd Cir. 1983) held as follows:

> "...deviations from Federal Rule of Procedure 11 will not be tolerated. *See, U.S. v. Journet*, 544 F.2d 633, 636 (2nd Cir. 1976). We have recently stated that on a direct appeal there will be little room for minimizing the effect of a failure to comply with a rule 11."

Del Vecchio v. U.S., 556 F.2d 106, 109 (2nd Cir. 1977); *See also, U.S. v Blackwell*, 694 F.2d 1325, 1339 (D.C. Cir. 1982); *U.S. v. Herrera*, 640 F.2d 958 (9th Cir. 1981). The Court is required to either approve or reject the contract in its entirety. *U.S. v. Fernandez*, 960

F.2d 771 (9th Cir. 1992); *U.S. v. Kramer*, 781 F.2d 1380, 1387 (9th Cir. 1986). The bargain must be explicit and nothing should be implied. *U.S. v. Holman*, 728 F.2d 809 (6th Cir. 1984), *reh. denied. U.S. v. Johnson*, 979 F.2d 396 (6th Cir. 1992), *reh. denied.* But unlike general contract law, the Federal Rules provide for the remedy of withdrawal if there is ambiguity that could confuse the defendant. The Court will closely scrutinize the government's failure to object and to clear up any ambiguity during the proceedings. *Johnson, supra*. In that case the sentence was to be within the guideline range, but the defense asked the Court for a possible deviation from the guidelines. The government remained silent. Where a defendant is being misled, the government is to specifically correct the record and ensure that the defendant understands the plea agreement.

If the judge accepts an 11(e)(1)(C) agreement he must sentence the defendant to the term in the agreement, and cannot modify that sentence. The Court's alternative is not to modify, but to reject it. *U.S. v. Cunavelis*, 969 F.2d 1419 (2nd Cir. 1992).

Flores was clearly misled as to what she could obtain by her efforts subsequent to the

plea. Under the circumstances any lay person would believe that probation was available, provided they put forth enough effort. Since Flores could not receive a lesser sentence, she plead in the midst of confusion.

A pre-sentence motion to withdraw a guilty plea is judged by a more lenient standard than the standard applied to a post-sentence motion. *U.S. v. Watley*, 97 F.2d 841 (D.C. Cir. 1993). If there is a fair and just reason, the court should allow it. *U.S. v. Gray*, 62 F.3d 57 (1st Cir. 1995). In *Gray*, the defendant told the Court that he did not exactly understand the maximum sentence and therefore Gray was misled.

Defendant Watley, *U.S. v. Watley, supra*, listened to the calculations of his counsel and the prosecutor concerning the guidelines that indicated that around seven years would be his sentence. But because he faced a mandatory ten year sentence, the seven years were not even an option. The discussion of an option that was not really available was held to be misleading. See also *U.S. v. Becklean*, 598 F.2d 1122 (1979).

Rather than rely upon subjective claims, courts seem to rely more heavily on objective evidence of a misunderstanding. *U.S. v. Gonzales*, 829 F.2d 575 (2nd Cir. 1987); *U.S. v.*

Roberts, 570 F.2d 999 (1977). When the record shows objective evidence that a defendant could have been justifiably confused concerning the plea bargain, courts have more readily remanded the case. The factors can be structured in this manner: an assertion of innocence; a claim of misunderstanding or apparent misunderstanding; objective evidence in the record that tends to substantiate the misunderstanding.

The objective evidence is the colloquy by the Court concerning probation; the allocution by the Court concerning the guidelines and their application to Flores; the statement by the Court that she could receive 36 months or less, her defense counsel's discussion of the 5K procedure with the Court, and her defense attorney's argument for a lesser sentence at sentencing. *See, U.S. v. Roberts, supra; U.S. v. Crusco*, 536 F.2d 21 (3rd Cir. 1976); *McCarthy v. U.S.*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Prosecutors must meet the most meticulous standards of both the promise and the performance whenever they engage in plea bargains. *U.S. v. Bowler*, 585 F.2d 851 (7th Cir. 1978). The government should have addressed the issue whenever the Court engaged in the colloquy

concerning the rarity of probation, and when the Court informed Flores that she could receive 36 months or less. The government's conduct implied that the government acquiesced in the position that she could receive less, and therefore the government was at least passively complicitous in the misunderstanding that induced the plea.

II. FLORES DID NOT PROPERLY AND KNOWINGLY WAIVE HER RIGHT TO COUNSEL AT THE HEARING ON THE MOTION TO WITHDRAW HER PLEA OF GUILTY AND SHOULD NOT HAVE BEEN ORDERED TO PROCEED *PRO SE*.

The standard of review is a de novo review of whether the Court erred by forcing her to proceed *pro se*. Depriving an individual of an attorney during the course of criminal proceedings is a violation of the individual's constitutional rights, unless that defendant voluntarily waives that right. *Walker v. Johnston*, 312 U.S. 275 (1941). In all criminal prosecutions the accused will have the right to assistance of counsel for his defense. U.S. Const. Amend. Six. A defendant is entitled to

be represented at any and all critical stages of a criminal proceeding; critical stages being those at which the substantial rights of a defendant may be effected. *See, Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336 (1967); *see also, U.S. v. Cronic*, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984).

To obtain relief from deficient representation, the accused must show prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). But there is a substantial difference between having a deficient lawyer, and having no lawyer at all. If the defendant has no lawyer, prejudice must be presumed, and the defendant should be entitled to relief. *U.S. v. Taylor*, 933 F.2d 307 (5th Cir. 1991); *Woodard v. Collins*, 898 F.2d 1027 (5th Cir. 1990).

Flores informed the Court that she did not want her attorney removed. The law presumes that a defendant has not exercised the right to self-representation in the absence of an articulate and *unmistakable* demand by the defendant to proceed *pro se*. *Tarantino v. U.S.*, 846 F.2d 1384, 1420 (D.C. Cir. 1988); *U.S. v Leggett*, 81 F.3d 220 (D.C. Cir. 1996). The risk of waiving

error, and the inability to present evidence in one's behalf are inherent in self-representation. Evidence and truth are of no avail, unless they can be adequately present-ed. *Adams v. U.S.*, 317 U.S. 269, 63 S.Ct. 236 (1943).

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open."

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), *quoting, Adams v. U.S., supra; see also, Von Moltke v. Gillies*, 332 U.S. 708 (1948).

The responsibility of the Court has been referred to as a "solemn duty" to ensure that an accused understands the right to an attorney at every step of the proceeding. In view of the strong presumption against a waiver, a judge must investigate the circumstances of a waiver very thoroughly. *Von Moltke, supra.*

The judge should be cautious and insure

that the defendant is affirmatively pursuing his right to proceed *pro se*. The Court in *Chapman v. U.S.*, 553 F.2d 886 (5th Cir. 1977) held:

> "Unless there be a case in which a defendant clearly asserts the right to defend *pro se* (so that denial of the right would be error) without clearly waiving the right to counsel (so that there remains some question whether the waiver was knowing and intelligent), a trial judge should engage in dialogue with such a defendant, explaining to him the consequences of defending *pro se*."

Gomez v. Collins, 993 F.2d 96 (5th Cir. 1993).

The government bears the burden of proving the validity of the waiver, and must show that antecedent to the waiver, Flores was made aware of the dangers of representing herself. *U.S. v. Cash*, 47 F.3rd 1083 (11th Cir. 1995).

Courts generally discourage self-representation. However in this case, it was forced upon her. *U.S. v. Meeks*, 987 F.2d 575 (9th Cir. 1993) was reversed because the Court presumed that Meeks had waived his right to counsel based on his conduct. That right was held to be fundamental, and cannot be implicitly

waived. *U.S. v. Balough*, 820 F.2d 1485 (9th Cir. 1987). The request to proceed *pro se* must be clear and unequivocal. *In the Matter of Hipp, Inc.*, 5 F.3d 109 (5th Cir. 1993).

Although the seminal decision on the right of self-representation is *Faretta v. California, supra*, the most extensive discussion on the procedure is in *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982). *Brown* held, at page 610, that "in the absence of a clear and knowing election, a Court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense." *Brown, supra* at 610. The Courts must indulge in every reasonable presumption that the defendant intends to proceed while represented.

In *U.S. v. Sanchez-Barretto*, 93 F.3d 17 (1st Cir. 1996), error was found where the court failed to determine whether the defendant had made an intelligent waiver of his right to an attorney before the plea withdrawal hearing. The defendant was acting *pro se* in that case and his attorney (much like Flores's attorney) spoke in direct contradiction to his position.

CONCLUSION

The judgment against CAROLINE HAGGARD FLORES should be reversed and remanded because the trial Court forced Flores to a hearing on her Motion to Withdraw Plea without counsel, and failed to grant Flores's Motion to Withdraw Guilty Plea.

PRAYER

Petitioner respectfully prays that this Court grant the petition for writ of certiorari.

Respectfully submitted,

JIMMY PARKS
101 Stumberg
San Antonio, Texas 78204
(210) 229-1322
State Bar No. 15524600

EDWARD CAMARA, JR.
126 E. Main Plaza, Suite 1
San Antonio, TX 78205
(210) 223-5893
State Bar No. 03674570

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50579

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CAROLINE HAGGARD FLORES, also known as Caroline Haggard,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas, San Antonio
(SA-96-CR-108-1)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:*

Caroline Haggard Flores appeals from a decision of the district court denying her motion to withdraw her guilty plea to two counts of conspiracy to defraud the United States. She argues both that the district

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

court erred in denying her motion and that she was denied her Sixth Amendment rights during the court's hearing on the motion.

We affirm the district court's decision. We review a district court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *See United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997). Here, we find that the district court properly considered Flores's motion with reference to all seven factors enunciated by this Court in *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984), for evaluating motions to withdraw guilty pleas. When Flores entered her guilty plea, she was assisted by counsel and voluntarily attested to facts that indicated her guilt. She then waited more than six months before seeking to withdraw her guilty plea, during which time the government conducted an expensive six-week trial against Flores's codefendants, which would need to be duplicated if Flores's withdrawal were accepted. Based upon these facts, the district court did not abuse its discretion in finding that the *Carr* factors supported denying Flores's motion to withdraw her plea.

We review de novo the district court's

determination that the plea withdrawal hearing did not violate Flores's Sixth Amendment rights. *See United States v. Walker*, 148 F.3d 518, 528 (5th Cir. 1998). Flores argues that because the district court required her to choose between using the attorney who negotiated the plea agreement or representing herself, she was denied both the right to representation free from a conflict of interest, *see Mitchell v. Maggio*, 679 F.2d 77, 78-79 (5th Cir. 1982), and the right to an attorney at a critical stage of her criminal proceedings, *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967). We disagree. In *United States v. Henderson*, 72 F.3d 463, 465-66 (5th Cir. 1995), we established that an attorney's participation in a plea negotiation is insufficient to render that attorney ineffective at a plea withdrawal hearing. Because Flores's attorney did not testify against her at the withdrawal hearing or otherwise render himself unable to effectively represent Flores, she was not unconstitutionally denied representation free from a conflict of interest. In addition, even if we were to find that Flores was denied an attorney at a critical stage of her

criminal proceedings, such a denial would have been harmless. *See United States v. Crowley*, 529 F.2d 1066, 1071 (3d Cir. 1976). The court permitted Flores an opportunity to present fully the factual basis for withdrawal of her guilty plea and she failed to present a compelling argument, either at the hearing or on appeal. *See id.* Granting Flores an opportunity to obtain a new attorney would not have affected the outcome of her motion or this appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
V.
CAROLINE HAGGARD FLORES,
aka CAROLINE GARNER, CAROLINE HAGGARD
Defendant.

Case Number SA-96-CR-108(1)
USAO Number 9302618
AND
Case Number SA-97-CR-112(4)
USAO Number 9401958

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, CAROLINE HAGGARD FLORES, aka CAROLINE GARNER, CAROLINE HAGGARD, was represented by Mr. Alan Brown.

On motion of the United States the Court has dismissed the remaining counts as to this defendant only.

The defendant pled guilty to Count Nine

of the indictment in Case Number SA-96-CR-108(1) and Count One of the indictment in Case Number SA-97-CR-112(4) on November 6,1997. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section 18 U.S.C. §371 involving 18 U.S.C. §1341
Nature of Offense Conspiracy to Commit Fraud
Date of Offense 5/11/94
Count Number(s) Nine in SA-96-CR-108(1)

Title & Section 18 U.S.C. §371 involving 26 U.S.C. §7201
Nature of Offense Conspiracy to Impede the Function of the Department of Treasury in Collecting Taxes
Date of Offense October 1991
Count Number(s) One in SA-97-CR-112(4)

As pronounced on May 12, 1998, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. This amount consist of $50.00 for Count Nine in Case Number SA-96-CR-108(1) and $50.00 for Count One in Care Number SA-97-CR-112(4), which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 3rd day of June, 1998.

Defendant's SSN: 245-84-4617
Defendant's Date of Birth: October 20, 1949
Defendant's address: #2 Carriage Hills, San Antonio, Texas 78257

/s/_____
ORLANDO L. GARCIA
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months. This term consists of 36 months in Case Number SA-96-CR-108(1) and 36 months in Case Number SA-97-CR-112(4), to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of 3 years in Case Number SA-96-CR-108(1) and 3 years in Case Number SA-97-CR-112(4), all such terms to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

_X_ The defendant shall report in person to the probation office in the District to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_X_ The defendant shall pay any fine, special assessment, costs of prosecution, or restitution that remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the Court.

_X_ The defendant shall not incur new credit charges or open additional lines of

credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

_X_ The defendant shall provide the probation officer access to any requested financial information.

_X_ Pursuant to USSG §5F1.3, the Court orders the defendant to complete 1500 hours of community service work without pay, at a location approved by the probation officer and by the Court.

_X_ Pursuant to 18 U.S.C. §3583(d) and USSG §5F1.5, the defendant is prohibited from engaging in the operation, directly or indirectly, of any Home Health Care organizations or any other business related to Medicare or any other similar program that may be administered by the Federal Government or State Government, such as Medicaid.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation

officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation

officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of

- $50,000,00. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows: $50,000.00 on Count Nine in Case Number SA-96-CR-108(1).

If the fine exceeds $2,500.00, interest will accrue on this fine unless the fine is paid in full within 15 days of this judgment pursuant to 18 U.S.C. § 3612(f)(1).

This fine shall be paid immediately.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

RESTITUTION AND FORFEITURE

RESTITUTION

Pursuant to 18 U.S.C. §3663 the Court Orders the defendant to immediately pay restitution to the Clerk, United States District Court for transfer to the victim in the following amount:

Name of Payee

Department of Health and Human Services

Health Care Financing Administration,
Division of Accounting,
P.O. Box 17255,
Baltimore, Maryland 21203-7255

Amount of Restitution

$3,646,109.00

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 25
Criminal History Category: 1
Imprisonment Range: 57 months to 71 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 10,000.00 to $ 100,000.00
Restitution: $ 3,646,109.00

The sentence departs from the guideline range for the following reason(s): Pursuant to the Government's 5K1.1 Motion.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

V. NO. SA-96-CR-1080G

CAROLINE HAGGARD FLORES

DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY

[Rule 32 (e) F.R.Cr.P.]

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

Now Comes Defendant, CAROLINE HAGGARD FLORES, who pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure, and by and through her undersigned counsel, respectfully moves this Honorable Court for an order granting her leave to withdraw her plea of guilty previously entered in this cause, and would respectfully show unto the Court the following:

I.

That the Defendant has entered a guilty plea in the above-entitled and numbered cause.

II.

The Defendant has informed the undersigned that she wishes to withdraw her guilty plea and respectfully asks this Court to set a date and time to hear this matter to "show fair and just reason" why the Court should grant her motion, pursuant to Rule 32 [e] F.R.Cr.P..

III.

Counsel's Motion is not made for the purposes of delay, but instead, in order that he can render effective assistance of counsel to Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court set a date and time for hearing on Defendant's Motion to Withdraw Plea of Guilty.

Respectfully submitted,

LAW OFFICES OF BROWN & NORTON
222 MAIN PLAZA
SAN ANTONIO, TEXAS 78205
(210) 227-5103 (O)
(210) 225-2481 (FAX)

/s/_____
BY: ALAN BROWN
STATE BAR NO. 03090000
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion To Withdraw Plea of Guilty has been delivered via facsimile to William R. Harris, W. Ray Jahn and Leroy Morgan Jahn, U.S. Attorney's office, 601 NW Loop 410, Suite 600, San Antonio, Texas 78216 on this the 8 day of May, 1998.

/s/_____

ALAN BROWN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
V. NO. SA-97-CR-112-040G
CAROLINE HAGGARD FLORES

DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY
[Rule 32 (e) F.R.Cr.P.]

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

Now Comes Defendant, CAROLINE HAGGARD FLORES, who pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure, and by and through her undersigned counsel, respectfully moves this Honorable Court for an order granting her leave to withdraw her plea of guilty previously entered in this cause, and would respectfully show unto the Court the following:

I.

That the Defendant has entered a guilty plea in the above-entitled and numbered cause.

II.

The Defendant has informed the undersigned that she wishes to withdraw her guilty plea and respectfully asks this Court to set a date and time to hear this matter to "show fair and just reason" why the Court should grant her motion, pursuant to Rule 32 [e] F.R.Cr.P..

III.

Counsel's Motion is not made for the purposes of delay, but instead, in order that he can render effective assistance of counsel to Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court set a date and time for hearing on Defendant's Motion to Withdraw Plea of Guilty.

Respectfully submitted,

LAW OFFICES OF BROWN & NORTON
222 MAIN PLAZA
SAN ANTONIO, TEXAS 78205
(210) 227-5103 (O)
(210) 225-2481 (FAX)

/s/_____
BY: ALAN BROWN
STATE BAR NO. 03090000
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion To Withdraw Plea of Guilty has been delivered via facsimile to William R. Harris, W. Ray Jahn and Leroy Morgan Jahn, U.S. Attorney's office, 601 NW Loop 410, Suite 600, San Antonio, Texas 78216 on this the 8 day of May, 1998.

/s/_____

ALAN BROWN

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

V. CAUSE NO. SA-96-CR-1080G

CAROLINE HAGGARD FLORES

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ORLANDO GARCIA:

NOW COMES, Defendant, CAROLINE HAGGARD FLORES, by and through her attorney of record, ALAN BROWN, and respectfully files this Motion For New Trial, and in support of same, would show the Court the following:

I.

Pursuant to Rule 33, Fed.R.Crim.P., and in the interest of justice, the Defendant asks this Court to vacate the judgment in this cause, as pronounced in open Court on May 12, 1998. The Defendant incorporates herein her previously filed Motion to Withdraw Plea of Guilty, and the reasons stated at the hearing on the motion, as reasons and the basis for her Motion for New Trial.

II.

The verdict of guilty, and failure to

permit Defendant to withdraw her plea of guilty is contrary to the law and facts.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully asks this Honorable Court to grant her a new trial.

Respectfully submitted,

LAW OFFICES OF BROWN & NORTON
222 MAIN PLAZA
SAN ANTONIO, TEXAS 78205
(210) 227-5103 (O)
(210) 225-2481 (F)

/s/_____
ALAN BROWN
BAR NO. 03090000
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that a true copy of the foregoing Motion has been delivered via facsimile to Mr. William R. Harris, Leroy and Ray Jahn, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216 on this 20th day of May, 1998.

_____
ALAN BROWN

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

V. CAUSE NO. SA-97-CR-112(04)OG

CAROLINE HAGGARD FLORES

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ORLANDO GARCIA:

NOW COMES, Defendant, CAROLINE HAGGARD FLORES, by and through her attorney of record, ALAN BROWN, and respectfully files this Motion For New Trial, and in support of same, would show the Court the following:

I.

Pursuant to Rule 33, Fed.R.Crim.P., and in the interest of justice, the Defendant asks this Court to vacate the judgment in this cause, as pronounced in open Court on May 12, 1998. The Defendant incorporates herein her previously filed Motion to Withdraw Plea of Guilty, and the reasons stated at the hearing on the motion, as reasons and the basis for her Motion for New Trial.

II.

The verdict of guilty, and failure to

permit Defendant to withdraw her plea of guilty is contrary to the law and facts.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully asks this Honorable Court to grant her a new trial.

Respectfully submitted,

LAW OFFICES OF BROWN & NORTON
222 MAIN PLAZA
SAN ANTONIO, TEXAS 78205
(210) 227-5103 (O)
(210) 225-2481 (F)

/s/_____
ALAN BROWN
BAR NO. 03090000
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that a true copy of the foregoing Motion has been delivered via facsimile to Mr. William R. Harris, Leroy and Ray Jahn, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216 on this 20th day of May, 1998.

_____
ALAN BROWN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. CAUSE NO. SA-96-CR-108-OG

CAROLINE HAGGARD FLORES,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

On this day came on for consideration defendant Caroline Haggard Flores's motion for new trial. After consideration of the motion, the Court concludes it is without merit and it is DENIED.

SIGNED and ENTERED July 29, 1998.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. CAUSE NO. SA-97-CR-112-OG

CAROLINE HAGGARD FLORES (4),
Defendant.

ORDER DENYING CAROLINE HAGGARD FLORES'S MOTION FOR NEW TRIAL

Before the Court is the motion for new trial of defendant Caroline Haggard Flores (Doc. 269). Having reviewed the motion and response, the Court finds the motion for new trial to be without merit. It is therefore DENIED.

SIGNED and ENTERED August 13, 1998.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

RELEVANT STATUTES

The Sixth Amendment to the Constitution of the United States, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

FED. RULES OF CRIM. PROC. 11(e)(1)(C):

"(1) The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
...(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions."

FED. RULES OF CRIM. PROC. 11(e)(3):

"If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement."

FEDERAL SENTENCING GUIDELINES MANUAL, § 5K1.1:

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance."

18 U.S.C. 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. 371 (In pertinent part):

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. ..."

18 U.S.C. 1001 (In pertinent part):

"(a) ...whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title or imprisoned not more than 5 years, or both. ..."

18 U.S.C. 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. 1957 (In pertinent part):

"(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to

that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

...

(d) The circumstances referred to in subsection (a) are-

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States;..."